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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 710

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner,*

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE ARGUS PRESS, SEATTLE

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OCTOBER TERM, 1958

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To the Honorable, The Supreme Court of the United States:

John C. Palmer, by Jean M. Palmer, his guardian ad litem, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Washington, which judgment affirmed the judgment of the Superior Court of the State of Washington which entered judgment in favor of the respondent upon the verdict of the jury.

OPINIONS OF THE COURTS BELOW

Judgment of the Superior Court of the State of Washington in favor of the respondent was entered on the 7th day of May, 1957. This being a court of first impression, the judgment is not reported. The judgment is appended hereto (Appendix A, p. 15).

Upon appeal to the Supreme Court of the State of Washington that court affirmed the judgment. The opinion of the Supreme Court of the State of Wash-

ington was filed July 17, 1958, and reported 152 Wash. Dec. 533; 328 P.(2d) 169 (Appended hereto. Appendix B, p. 17).

Petitioner's petition for rehearing in the Supreme Court of the State of Washington was denied by order filed December 10, 1958. Such order denying petition for rehearing was reported in 153 Wash. Dec. 246, ... P. (2d) ..... (Appended hereto, Appendix C, p. 22).

JURISDICTION

1. The judgment and decree of the Supreme Court of the State of Washington, sought to be reviewed herein, was dated July 17, 1958, and was entered on the same date.

2. After filing of the original opinion and judgment in the Supreme Court of the State of Washington, a petition for rehearing was filed on the 12th day of August, 1958. On the 10th day of December, 1958, an order was filed by the Supreme Court of the State of Washington denying the petition for rehearing. Appended hereto (Appendix C, p. 22).

3. Jurisdiction of this court is sustained by the Act of June 25, 1948, C. 646, P. 1, 62 Stat. 929, now 28 U.S.C.A. §1257(3) and 62 Stat. 963, now 28 U.S.C.A. §2106.

4. This petition is timely filed within ninety days from the 10th day of December, 1958, the date upon which petitioner's application for rehearing was denied by the Supreme Court of the State of Washington.[1]

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[1] Act of June 25, 1948, C. 646, P. 1, 62 Stat. 961, as amended May 24, 1949, C. 139, P. 106, 63 Stat. 104, 28 U.S.C.A. §2101(c).

QUESTIONS FOR REVIEW

1. Is intoxication of a merchant seaman to such a degree that the seaman is unable to care for himself, an illness which imposes on the other crew members a duty to use reasonable care to assist the helpless intoxicated seaman to a place of safety?

2. Is there a duty as a matter of law requiring a vessel owner to assist a crew member to a place of safety when he is found on the deck of the vessel in a helpless intoxicated condition?

3. When a ship's officer and a fellow crewman are assisting a helpless intoxicated seaman from the deck to his quarters are they in the performance of a duty owed by the vessel to the seaman?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The constitutional provision applicable to the instant matter is Article III, Sec. 2, Clause 1:

> "The judicial Power shall extend to all cases * * * of admiralty and maritime jurisdiction; * * * ".

The statutes involved are the Jones Act,[2] reading in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * * ."[3]

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[2] Act of June 5, 1920, C. 250, 41 Stat. 1007, 46 U.S.C.A. §683, *et seq.*

[3] 46 U.S.C.A. §688.

and the Federal Employers Liability Act,[4] reading in part as follows:

> "Every common carrier by railway while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * equipment * * *."[5]

STATEMENT OF THE CASE

John C. Palmer, by his guardian ad litem, Jean M. Palmer, sued his employer, the Waterman Steamship Corporation, to recover damages for injuries which he sustained on August 22, 1955, on board the SS "JOHN B. WATERMAN" then alongside of the dock in Seattle, Washington.

About 3:05 A.M. on the above date Palmer, an oiler on the vessel, was seen on the deck of the vessel near No. 4 hold by Wood, the second assistant engineer. Palmer was apparently intoxicated and Wood went over to see if he needed any help. Shortly thereafter Koski, another crew member, joined Wood to assist him. Koski testified he did not believe Palmer could walk by himself (R. 46, Dep. p. 15), and he was trying to get Palmer back to his quarters because of the danger of Palmer getting hurt (R. 46, Dep. p. 20). Peterson, the gangway watchman on the vessel, observed Koski and Wood try-

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[4] Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U.S.C.A., §51, *et seq.*

[5] 45 U.S.C.A. §51.

ing to pick up Palmer, who was then in a prone position, flat on his back apparently "passed out" with his eyes completely closed (R. 44, Dep. pp. 11-12).

Wood and Koski each took hold of an arm and helped Palmer back, walking on the port side of the vessel to a small house on the after end of the vessel which contained the entrance of the passageway which led to the stairway into the crew's quarters on the deck below. Because of the narrow width of this passageway, Koski went in first, followed by Palmer and then Wood. While in the passageway, Palmer supported himself by holding onto the side as they approached the top of the stairway (R. 46, Koski Dep. p. 15).

When they came to the top of the stairway, Koski became disgusted (Koski Dep. p. 27) with Palmer and went on down the stairway, leaving Palmer and Wood at the top (R. 45, Koski Dep. p. 10)). Wood watched Palmer take a couple of steps down the ladder alone and then Wood turned and started back in the passageway to his own quarters on the main deck (R. 47, St. 356). Koski was at the foot of the stairs and looked up and saw Palmer's feet starting to come down the ladder and then Palmer fell (R. 45, Koski Dep. p. 10). Wood had just stepped out of the doorway onto the main deck when he heard the fall (R. 47, St. 356).

As the result of the fall, Palmer sustained multiple skull fractures and severe brain damage which affected his mental faculties. The injuries were such that Palmer became an inmate of a mental institution and could not testify. The action was brought by his guardian *ad litem*, Jean M. Palmer, his wife.

THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS REACHED

This case was tried before a jury in the Superior Court of the State of Washington for King County, a court of original jurisdiction. It was petitioner's position throughout the trial, that when Palmer was found on the vessel in a helpless condition and unable to look out for his own safety, even though the helplessness was caused by intoxication, the vessel and the other crew members owed Palmer the duty to use reasonable care to assist Palmer to his quarters or to a place of safety where he would not be harmed by reason of his inability to protect himself. This obligation was due Palmer because he was a seaman and engaged in maritime employment. Under this theory, when Wood and Koski attempted to assist Palmer to his quarters, they were acting in the course of their employment for the vessel, and not as volunteers. The only question to be determined by the jury was whether Wood and Koski used due care under the circumstances in leaving Palmer in his condition at the top of the stairway.

Petitioner requested the trial court to charge the jury that there was a duty on the part of the officers and crew of the SS "JOHN B. WATERMAN" to exercise reasonable care to assist a fellow crew member who was on board and in a helpless condition by reason of intoxication. The trial court refused the proposed charge to which the petitioner excepted[6] (R. 34-35).

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[6] Plaintiff excepts to the failure of the court to give its proposed Instruction No. 17 (St. of Facts 432, L. 18 through L. 6, page 433): "I instruct you that under the law and facts in this case there is a duty on the part of the officers and crew of the SS 'JOHN B. WATERMAN' to exercise reasonable care to escort and assist a fellow crew member of that

The trial court charged the jury that the vessel was not liable for the acts of Koski and Wood in rendering assistance to Palmer unless they found that there was on board the SS "JOHN B. WATERMAN" a practice or custom which was invariably followed, and which was known or should have been known to the master of the vessel and which was for the benefit of the defendant for members of the crew to assist other members who were helpless by reason of intoxication. Petitioner excepted to the giving of this instruction upon the ground that such duty existed as a matter of law and should not have been submitted to the jury as a question of fact[7] (R. 32).

The jury's verdict was found in favor of the respondent upon which a judgment was duly entered. Peti-

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[6] (Continued)
vessel who was on board and in a helpless condition by reason of intoxication. I further instruct you that in determining whether or not a seaman was in such condition as to rpquire the assistance to which I have heretofore referred, you shall consider his condition with relation to the circumstances existing around said seaman and the place where he was found, at the time he was observed by the officers or men, in such condition." on the ground and for the reason that this is another instruction wherein we propose that there is a duty as a matter of law to care for the plaintiff under the circumstances as the jury may find in his case (Appendix E, p. 25).

[7] Plaintiff excepts to the court's giving of Instruction No. 11 (St. of Facts 421, Line 28 through Line 6, P. 423), where the court makes it as an issue whether or not a custom or practice to care for helpless seaman exists, which instruction reads as follows: "I instruct you that defendant is not liable for the acts of Frank Koski and Donald Wood in rendering assistance to plaintiff unless you find that there was on board the SS 'JOHN B. WATERMAN' a practice or custom which was invariably followed, and which was known to, or which should have been known, in the exercise of reasonable care, to the master of the ship owned by the defendant, and which was for the benefit of defendant in the service of the ship, for members of the crew to assist other members of the crew who are helpless by reason of intoxication." on the ground and for the reason stated in my motion to direct the jury to find such custom and practice as a matter of law and does not apply to maritime law (Appendix F, p. 26).

tioner appealed to the Supreme Court of the State of Washington which affirmed the judgment of the lower court, the Supreme Court's opinion being filed July 17, 1958 (Appendix B, p. 17) holding that there was no duty as a matter of law to assist Palmer and that the existence of such duty was properly submitted to the jury as a question of fact.

Petition for rehearing of the State Supreme Court's opinion was denied on December 10, 1958 (Appendix C, p. 22).

REASONS FOR ALLOWANCE OF THE WRIT

1. The Supreme Court of the State of Washington has decided a Federal question of substance, namely, the nature of the obligation of a ship owner employer to a seaman who is ill and helpless by reason of intoxication, not heretofore determined by this court and probably not in accord with applicable decisions of this court.

2. The question involves the nature of the obligation of a vessel owner to a sick seaman under the maritime law. The Supreme Court of the State of Washington held that if the seaman's illness is due to intoxication, then the obligation to care for the seaman which ordinarily applies in case of illness, does not apply as a matter of law. Such obligation can only be established by proving that a custom to care for the seaman existed on the particular vessel involved.

The effect of this decision is to make a distinction depending upon the cause of the illness which creates the seaman's helpless condition. If the illness was caused by intoxication, then the seaman does not have the

rights he would have if the illness was caused by an epileptic fit, a stroke, a heart attack, or other condition.

ARGUMENT IN SUPPORT OF WRIT

There Is a Duty, as a Matter of Law, to Assist a Helpless Seaman Found on the Deck of a Vessel, to a Place of Safety, Even Though His Helpless Condition Was Caused by Intoxication

It is the position of the petitioner, that intoxication so extreme that it results in physical helplessness and inability to protect one's self is equivalent to illness. This physical condition following intoxication is the same as far as the seaman's legal rights are concerned if the helplessness was caused by a heart attack, an epileptic seizure, or a stroke which leaves the seaman in such a condition that he cannot care for himself. Such physical condition places a duty as a matter of law upon the vessel employer to care for the seaman. The nature and extent of the duty depends upon the illness and the surrounding circumstances.

The relationship of a seaman to a vessel is the basis of the obligation of the vessel owner to care for the seaman when the circumstances require it. The classic statement that seamen are wards of the Admiralty has been likened to the obligation due from parents to children.[8]

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[8] *Robertson v. Baldwin* (1896) 165 U.S. 287, 41 L.Ed. 715, 719: "Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians: 'Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares. The ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." '(As a father toward his sons, as a teacher toward his students, a master toward his servants or those of the household.)

The fact that the physical condition which required the application of this duty arose because of the seaman's own fault has never been recognized as a defense or an excuse for the failure to supply this duty.[9] The trial court in the instant case recognized that intoxication was not a defense by instructing the jury that prior misconduct on the part of Palmer in arriving at this condition may not be used as a defense to the action or in mitigation of damages[10] (R. 32-33).

This was entirely consistent with the petitioner's po-

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[9] In *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 1933 A.M.C. 9, Judge Cardozo poses the question: "Let us suppose the case of a seaman slightly wounded through his own fault, but suffering grievous hurt thereafter as a consequence of septic poisoning brought about by lack of treatment." (1933 A.M.C. 11)

Judge Cardozo then continues that in such a case liability would nevertheless exist on the part of the shipowner. We quote further (p. 14): "The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.' *Robertson v. Baldwin*, 165 U.S. 275, 287. Another court said: 'The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited.' *Scarff v. Metcalf*, 107 N.Y. 211, 215. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection. There is doubt, and that substantial, whether the administrator of a railroad engineer who by misadventure has fallen from his locomotive while the train is on a bridge has a cause of action under the Federal Employers' Liability Act because of the failure of the crew of the train to come to the rescue of their comrade. *Harris v. Penn. R. R. Co.*, 1931 A.M.C. 1303, 50 F.(2d) 866, 868. There is little doubt that rescue is a duty when a sailor falls into the sea, *United States v. Knowles*, 4 Sawy. 517, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. *Harris v. Penn. R. R. Co., supra.*"

[10] Court's Instruction No. 12: " * * * I further instruct you that any prior misconduct on the part of the seaman in arriving at such a helpless or disabled condition may not be used by the shipowner as a defense to an action brought for his failure to exercise reasonable care or in mitigation of any damage caused by his failure to exercise reasonable care" (Appendix G, p. 27).

sition that the duty to supply extra care does not exist unless the jury must first find that Palmer was helpless. The trial court defined the term "helpless" to the jury as the inability of the crew member to care for his own safety aboard a vessel in view of the conditions existing on board at that time[11] (R. 35-A).

The trial court also cautioned the jury that gross intoxication alone was not enough to require care by the defendant but that Palmer must have been reduced to helplessness[12] (R. 33).

It is thus apparent that the term "helpless" as defined by the court and considered by the jury refers to a physical condition that made it impossible for Palmer to care for his own safety. Such physical condition of the seaman has long been recognized by the Federal courts as creating a corresponding obligation on the part of the vessel to use reasonable care to prevent further harm to the seaman because of this condition. These courts have allowed recovery of damages to a seaman suffering delirium tremens from severe intoxication ashore, who fell down a hatch having escaped while momentarily unguarded;[13] allowed damages to the depend-

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[11] Court's Instruction No. 14: "I instruct you that the term 'helpless,' as used in these instructions, refers, in the normal meaning of the word, to the inability of a member of the crew to care for his own safety on board a vessel in view of the conditions existing on board said vessel at that time." (Appendix I, p. 27).

[12] Court's Instruction No. 13: "You must find for defendant unless you find that plaintiff was helpless at the time Frank Koski and Donald Wood terminated their assistance to plaintiff. Even if plaintiff was intoxicated or grossly intoxicated at such time, you must find for defendant unless you find that at such time plaintiff had been reduced to helplessness." (Appendix H, p. 27).

[13] *Reck v. Pac. Atl. S. S. Co.* (CCA 2) 180 F.(2d) 886, 1950 A.M.C. 744.

ents of an insane seaman who jumped overboard and was drowned when not restrained;[14] allowed damages for the failure to search the room or the belongings of a mentally deranged seaman who committed suicide by cutting his throat with a razor.[15]

The duty to supply maintenance and cure to a seaman stems from this same obligation. It must be borne in mind, however, that maintenance and cure, is but a *measure* of that duty. Circumstances may exist which would require more than simply making maintenance and cure available. For example, these benefits must not simply be made available but reasonable steps must be taken to assure that the seaman receives such benefits.[16-17]

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[14] *Bracher v. Union Dredging Co.* (CCA 9) 104 F.(2d) 762, 1939 A.M.C. 944.

[15] *Tetterton v. Arctic Tankers* (D.C. Pa.) 116 F.Supp. 429, 1954 A.M.C. 397.

[16] *Murphy v. American Barge Line* (CCA 3) 169 F.(2d) 61, 1949 A.M.C. 158. The seaman fell ill requiring hospitalization. He was put ashore with a pass admitting him to the hospital, 200 miles to 300 miles distant, but the vessel made no arrangements to get him to the hospital, or supply him with necessary funds. The court held that the vessel should have taken affirmative steps and supply the means for the plaintiff to get to the hospital, "It is worthwhile reminding ourselves of the orthodox rule that seamen are wards of the admiralty. The employer also occupies a position of guardianship, at least in the instance where the injury occurred on board the ship and he was aware of it before the seaman left the ship. *Cortes v. Baltimore Insular Line* (1932) 287 U.S. 367, 374-377. The record shows that this libelant was in his fifties; had a family of five children; had been discharged from his job in December and a month later was, on the evidence presented for him, in very considerable physical distress. It is to be remembered that this duty of maintenance and cure is an affirmative one. Affirmative obligations in the law are comparatively few and are confined, for the most part, to relationships among a family unit. But this duty on the part of the master to care for the seaman is one of the oldest and most conspicuous in the law of affirmative obligations."

[17] *Spellman v. American Barge Line* (CCA 3) 176 F.(2d) 716, 1954

Where the seaman is found upon the ship in a helpless condition a duty then exists on the part of the vessel employer to take such steps as are reasonably necessary under the circumstances to see that the sick crew member is taken to a place of safety. If, however, the seaman suffering illness *is found ashore,* then a duty may, or may not, exist according to the custom or practice, and proof of custom or practice is essential.[18-19]

The Supreme Court of the State of Washington holds that if intoxication is the cause of the incapacitating illness of the seaman on the vessel, proof of custom or practice to assist the seaman must be found. This rule substantially limits the rights of seamen. To require the seaman to prove that a custom or practice existed on the particular vessel when the illness was caused by intoxication, restricts traditional rights of the seaman which the courts have recognized are essential to encourage and maintain the calling of merchant seamen.

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[17] (Continued)
A.M.C. 724. In this case the seaman manifested symptoms of mental disorder on the vessel. The master put her off the vessel, supplied her with a bus ticket and some money, and two members of the crew put her on the bus at Evansville, Indiana, for Louisville, where there was a Marine Hospital. She disappeared, was found two days later in a dazed condition in her home town, disheveled, bruises on her body, in a catatonic shock. Her guardian brought an action for damages. In reversing the case because of error in the trial court's instruction, the Circuit Court stated (p. 719): "Merely furnishing means of transportation without making sure that they are employed by a mentally ill seaman may not amount to affording a method of transportation at all. Giving a bus ticket to a person who is mentally ill is hardly a method of affording safe transportation. What the captain of The Bruce did must be found by the jury to have been inadequate or insufficient in the execution of his duty in the light of the circumstances in the case."

[18] *Buckeye S. S. Co. v. McDonough* (D.C. Ohio) 103 F.Supp. 473, 1951 A.M.C. 2042, aff'd 1953 A.M.C. 343 (CCA 6).

[19] *Robinson v. Northeastern S. S. Co.* (CCA 2) 228 F.(2d) 679, 1956 A.M.C. 289.

We respectfully urge that it makes no difference what causes the helpless condition. If the seaman is helpless, then a duty arises as a matter of law to care for him.

It is respectfully urged that the Writ be granted.

Respectfully submitted,

SAM L. LEVINSON
EDWIN J. FRIEDMAN
Attorneys for Petitioner.

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Plaintiff*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Defendant*.

No. 488932

JUDGMENT

THIS CAUSE came regularly on for trial upon the merits before the undersigned judge of the above entitled court, sitting with a jury, the plaintiff appearing by Jean M. Palmer, his guardian ad litem, and by his attorneys Levinson and Friedman, and the defendant appearing by its attorneys Graham, James & Rolph and Riddell, Riddell & Williams, and both sides having announced themselves ready for trial, and the jury having been duly impaneled and sworn, and the plaintiff having introduced testimony and rested, and defendant having introduced testimony and rested, and the court having instructed the jury, and the cause having been argued to the jury by counsel, and the jury having retired to consider its verdict and having returned a verdict in favor of defendant and against the plaintiff,

NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff, and the various amended complaints of the plaintiff, be, and the same are hereby, dismissed with prejudice, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that de-

fendant have and recover of and from the plaintiff its statutory costs and disbursements herein to be taxed.

DONE IN OPEN COURT this 7th day of May, 1957.

GEORGE H. REVELLE
Judge

Presented by:
DONALD S. VOORHEES
of Riddell, Riddell & Williams
Attorneys for defendant
Waterman Steamship Corporation. (R. 18-19).

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN C. PALMER by JEAN M. PALMER, his Guardian ad Litem, *Appellant*,
vs.
WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.
No. 34383

OPINION

Department One, July 17, 1958

Appeal from a judgment of the Superior Court for King County, No. 488932, Revelle, J., entered May 7, 1957, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries. Affirmed.

The plaintiff was a seaman on defendant's ship. He was observed on the deck of the vessel in an intoxicated condition about three o'clock a.m., on August 22, 1955, by two crew members. They proceeded to help him toward his quarters by each taking an arm and walking him along the deck. When they reached the after deckhouse, one man preceded and one man followed plaintiff along a passageway to the top of the ladder leading down to the crew's quarters. One man left him, at this point, and the other left after plaintiff had taken a couple of steps down the ladder. A few seconds later, the plaintiff fell down the ladder and was severely injured.

The plaintiff sued by his guardian ad litem for the injuries received. From a judgment in favor of defendant, plaintiff appeals.

The appellant assigns error (1) to the court's refusal to give two requested instructions, which would have imposed a duty, as a matter of law, on the shipowner to care for a seaman in a helpless condition by reason of intoxication, and (2) in submitting to the jury the issue as to whether there was, in fact, such a duty on the part of the shipowner.

1. Appellant contends, in support of this assignment, that a shipowner has the duty to provide maintenance and cure for a sick or injured seaman; that intoxication constitutes a sickness which invokes that duty; and that this duty includes adequate measures to prevent him from being injured as a result of his intoxication.

We do not agree that the duty of maintenance and cure of sick and injured seamen includes the duty to prevent injury by reason of intoxication.

In the instant case, the appellant has received the maintenance and cure which a seaman is entitled to receive because of his injury. He needed no maintenance and cure for his intoxication prior to the injury. If there was any duty of care on the part of the shipowner prior to the injury, it must be based, therefore, not on the subsequent sickness or injury, but on the seaman's intoxication prior thereto. The question is as to the duty, if any, that a shipowner owes to an intoxicated seaman, not what is the nature of the duty of maintenance and cure that is owed to an injured seaman. The assignments are not well taken.

2. Appellant assigns as error the submission to the jury of the issue of whether or not there was an "invariable" custom under which the shipowner owed a

duty of care to an intoxicated seaman. The testimony on this point was conflicting and appellant now objects to the word "invariable" in the instruction. No such objection was made at the time the instruction was submitted to the jury. It cannot be raised later for the first time.

3. Appellant contends the trial court erred in admitting certain testimony of two witnesses as to his prior intoxication. This evidence was admitted for the purpose of affecting appellant's ability to earn money by holding a steady job. The evidence was properly admitted for that purpose, as it affected the amount of damages suffered from loss of wages.

4. Appellant contends the trial court erred in admitting the testimony of a witness as to the ability of intoxicated seamen generally to descend ladders on a ship. The trial court properly admitted this evidence for the limited purpose of tending to establish the standard of reasonable care, which was owed to appellant under the circumstances.

5. Appellant contends that respondent was guilty of prejudicial misconduct in arguing the morality of drinking to the jury. Appellant objected to this line of argument, and the objection was sustained. Appellant did not ask for a mistrial. The jury was instructed that prior misconduct of the appellant was no defense, and that it could not be used to mitigate damages if the jury found liability. It was not prejudicial error.

6. Appellant contends the respondent was guilty of prejudicial misconduct in bringing the fact before the jury that appellant's family was on California welfare

at the time of the trial. Respondent posed a long series of questions as to the welfare history of appellant and his family. This portion of the testimony was objected to as immaterial, and the objection was sustained. Appellant did not claim, at the time, that the question was prejudicial. He did not ask for a mistrial or for a curative instruction, or move to strike the testimony. Further, the testimony only went to the question of damages and could not be prejudicial, since the jury found there was no liability. Appellant contends this is the same as reference to insurance, and, as such, it could not be cured by an instruction. We do not agree.

7. Public assistance is available to dependent families with little or no earning power, and, thus, evidence relating to welfare prior to the accident was properly admitted as affecting the amount of wages lost as a result of the injury.

Appellant assigns error to the trial court's Instruction No. 20A, which reads:

> "Although there has been some testimony in this case as to the cost or value of nursing and medical services, I instruct you that such testimony is to be totally disregarded by you in computing plaintiff's damages, if you should find for the plaintiff, for the reason that plaintiff has made no claim in this action that he or his family will incur any expense for his care or treatment."

8. This case is before us on a short record, and this error was not included in the statement of points to be relied upon. Neither the court, in making its certificate, nor opposing counsel, who had the right to propose amendments to the statement of facts, had an opportu-

nity to pass upon the sufficiency of the record with regard to this assignment of error. It, therefore, cannot be considered upon appeal.

9. Appellant contends that under Rule of Pleading, Practice and Procedure 19, 34A Wn.(2d) 81, as amended, effective November 1, 1955, his motion for summary judgment on the issue of liability, made before trial, should have been granted.

We hold that the motion was properly denied, since there were issues of fact as to the extent of appellant's intoxication, the degree of negligence, if any, exercised toward him, and the existence of respondent's duty of care. This is, therefore, not a case of liability, as a matter of law, and it was properly submitted to the jury.

The judgment is affirmed.

HILL, C. J., FINLEY, HUNTER, and FOSTER, J. J., concur.

(R. 20-24)

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner*, vs. WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.	No. 34383 Filed December 10, 1958

ORDER DENYING PETITION FOR REHEARING

The court having considered the appellant's position for a rehearing herein, the respondent's answer to the petition, and the appellant's reply to the respondent's answer; and a majority of the court having determined that the petition should be denied,

IT IS ORDERED that the petition for a rehearing be and it is hereby denied.

Dated this 10th day of December, 1958.

By the court:

MATTHEW W. HILL
Chief Justice

(R. 31)

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner*, vs. WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*, and STANLEY STEAMSHIP CORPORATION, a corporation, *Defendant*.	No. 34383

JUDGMENT

Filed December 10, 1958; King County No. 488932

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 10th day of December, A.D. 1958, on motion of Riddell, Riddell and Williams, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Waterman Steamship Corporation, a corporation, have and recover of and from the said John C. Palmer, by Jean M. Palmer, his Guardian ad Litem, and from American Bonding Company of Baltimore, surety to the extent of $300.00, the costs of this action taxed and allowed at One Thousand, Two Hundred Fifty-four and 80/100 ($1,254.80) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the

said Superior Court for further proceedings, in accordance herewith.

Judgment of Record in the Office of the Clerk of the Supreme Court in Journal 43 at page 145. (R. 48)

APPENDIX E

PLAINTIFF'S EXCEPTION TO TRIAL COURT'S FAILURE TO GIVE PROPOSED INSTRUCTION No. 17

Plaintiff excepts to the failure of the court to give its proposed Instruction No. 17, reading as follows:

> "I instruct you that under the law and facts in this case there is a duty on the part of the officers and crew of the SS "JOHN B. WATERMAN" to exercise reasonable care to escort and assist a fellow crew member of that vessel who was on board and in a helpless condition by reason of intoxication.
>
> "I further instruct you that in determining whether or not a seaman was in such condition as to require the assistance to which I have heretofore referred, you shall consider his condition with relation to the circumstances existing around said seaman and the place where he was found, at the time he was observed by the officers or men, in such condition."

on the ground and for the reason that this is another instruction wherein we propose that there is a duty as a matter of law to care for the plaintiff under the circumstances as the jury may find in this case (R. 34-35).

APPENDIX F

PLAINTIFF'S EXCEPTION TO THE TRIAL COURT'S INSTRUCTION NO. 11 THAT THE DUTY TO ASSIST PALMER WAS A QUESTION OF FACT

Plaintiff excepts to the court's giving of Instruction No. 11, the court's Instruction No. 11, where the court makes it as an issue whether or not a custom or practice to care for helpless seamen exists, which instruction reads as follows:

> "I instruct you that defendant is not liable for the acts of Frank Koski and Donald Wood in rendering assistance to plaintiff unless you find that there was on board the SS "JOHN B. WATERMAN" a practice or custom which was invariably followed, and which was known to, or which should have been known, in the exercise of reasonable care, to the master of the ship owned by the defendant, and which was for the benefit of defendant in the service of the ship, for members of the crew to assist other members of the crew who are helpless by reason of intoxication."

on the ground and for the reason stated in my motion to direct the jury to find such custom and practice as a matter of law and does not apply to maritime law (R. 32).

APPENDIX G

COURT'S INSTRUCTION No. 12

"I instruct you that, where a vessel owner in pursuance of his obligation, if any, to care for an intoxicated or disabled seaman undertakes the care and safety of such a seaman with knowledge of the helpless condition of such a seaman, he must exercise reasonable care in the performance of said obligation or duty. I further instruct you that any prior misconduct on the part of the seaman in arriving at such a helpless or disabled condition may not be used by the shipowner as a defense to an action brought for his failure to exercise reasonable care or in mitigation of any damage caused by his failure to exercise reasonable care" (R. 32-33).

APPENDIX H

COURT'S INSTRUCTION No. 13

"You must find for defendant unless you find that plaintiff was helpless at the time Frank Koski and Donald Wood terminated their assistance to plaintiff. Even if plaintiff was intoxicated or grossly intoxicated at such time you must find for defendant unless you find that at such time plaintiff had been reduced to helplessness" (R. 33).

APPENDIX I

COURT'S INSTRUCTION No. 14

"I instruct you that the term 'helpless,' as used in these instructions, refers, in the normal meaning of the word, to the inability of a member of the crew to care for his own safety on board a vessel in view of the conditions existing on board said vessel at th[illegible]t time" (R. 35-A).

FILE COPY

Supreme Court, U.S.
APR 14 1958
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 710

JOHN C. PALMER by JEAN M. PALMER, his guardian *ad litem*, *Petitioner*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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In the

Supreme Court of the United States

OCTOBER TERM, 1958

JOHN C. PALMER by JEAN M. PALMER, his guardian *ad litem*, *Petitioner*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.

No. 710

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To the Honorable, The Supreme Court of the United States:

COMES NOW respondent and submits this brief in opposition to the issuance of a writ of certiorari in this cause to the Supreme Court of the State of Washington.

QUESTIONS FOR REVIEW.

Petitioner has framed three questions as being the ones which he seeks to have reviewed by this court. We respectfully suggest that the ultimate question upon which he seeks review is the following:

> 1. If, at a time when he is off-duty, a member of the crew of a vessel voluntarily undertakes to render assistance to an intoxicated shipmate, is the negligence, if any, of the one rendering assistance imputed as a matter of law to his employer, the shipowner?

As pointed out in Section II of the Argument of this brief, this federal question was never reached in the

state courts so as to make that question now reviewable by this court.

STATEMENT OF THE CASE

(The abbreviation "St." will be used to refer to the Statement of Facts and "Supp. St." will be used to refer to the Supplemental Statement of Facts, which have been certified to this court as a part of the Supplemental Record.)

Petitioner John C. Palmer, by his guardian *ad litem*, Jean M. Palmer, sued his employer, respondent Waterman Steamship Corporation, to recover damages in the sum of $200,000.00 for injuries which he sustained on August 22, 1955, on board the SS JOHN B. WATERMAN which was then alongside a dock in Seattle, Washington.

Palmer signed on the JOHN B. WATERMAN in San Francisco, California, on August 11, 1955, just eleven days before his injury. Between the time of his joining the vessel and the day of his injury, Palmer was twice observed on board the JOHN B. WATERMAN in a state of intoxication (St. 139-143; 269-272). Upon one occasion the officer on watch in the engine room believed Palmer to be incapable of standing his watch as a fireman by reason of intoxication and ordered him to go into the machine shop and "sleep it off" (St. 271-272).

Palmer was on watch in the engine room of the JOHN B. WATERMAN from the time that the vessel arrived in Seattle, Washington, at 2124 on August 21, 1955, until shortly before midnight of that day (St. 267). Despite the prohibitions of the Shipping Articles and the regulations of the vessel against having or drinking intoxicants aboard the vessel (Supp. St.: Coleman Dep. 37-

40; 86-87; 89; Patrick Dep. 10-11; 15-17). Palmer did become intoxicated on board the JOHN B. WATERMAN between the time that he came off watch and the time that he was injured at about 0305 on August 22, 1955.

A few minutes before 0305 on August 22, 1955, Donald Wood, the second assistant engineer, who was off-duty at the time, observed Palmer walking unsteadily on the weather deck of the vessel and went over to him (St. 346-349). Shortly thereafter Frank Koski, a member of the crew who was returning from liberty on shore and who was likewise off-duty, overheard Wood and Palmer and went over to give Palmer a hand in getting back to his quarters (Supp. St.: Koski Dep. 8).

Wood and Koski then walked with Palmer back to the house at the after end of the vessel. This after-house contained an athwartship passageway leading to a midship stairway which in turn led to the crew's quarters below. At the entrance to the athwartship passageway there was a coaming which was 15½ inches high. Palmer stepped over this coaming without help and without any difficulty (St. 355; Supp. St.: Koski Dep. 31). Koski, who was called by Palmer as a witness, testified that Palmer was not stumbling as he walked and that Palmer was able to walk without assistance so long as he had something with which to steady himself (Supp. St.: Koski Dep. 16; 21).

Koski testified that at the head of the stairway, Palmer indicated that he wanted to stay there and talk with Wood (Supp. St.: Koski Dep. 10), so Koski proceeded down the stairs to his quarters below. When he reached the bottom of the stairway, Koski looked back

and observed that Palmer was starting down. He testified that Palmer had hold of both handrails and that he was not swaying or doing anything that indicated that he was having any difficulty. He further testified that had Palmer been doing anything that indicated that he was having any difficulty, Koski would have gone back up the stairs and helped him (Supp. St.: Koski Dep. 32-33). Wood testified that at the head of the stairway either he or Koski asked Palmer if he was all right and that Palmer replied, "Sure, I am going to bed" or "I am okay." When Palmer started down the stairway, Wood observed that Palmer had both his hands on the handrails and that he was apparently proceeding down the stairs without difficulty (St. 355).

In his statement of the case, petitioner states (Pet. cert. 4):

> "Peterson, the gangway watchman on the vessel, observed Koski and Wood trying to pick up Palmer, who was then in a prone position, flat on his back apparently 'passed out' with his eyes completely closed."

It is true that Peterson so testified in a deposition taken on behalf of petitioner. Wood, however, expressly denied that Peterson was ever around to make any such observation (St. 363); and in his deposition, Koski at no time mentions the presence of Peterson. In addition the testimony of Peterson flatly contradicted a written and signed statement given by him on the day of the accident in which he stated that he had not seen Palmer at any time when he was on gangway watch prior to the accident (Supp. St.: Peterson Dep. 29, 30).

The trial of this cause before a jury consumed two

weeks of time. After deliberation the jury returned a verdict in favor of respondent. The trial judge denied petitioner's motion for a new trial. The Supreme Court of the State of Washington affirmed the judgment of the trial court and subsequently denied a rehearing to petitioner.

ARGUMENT

I.

There Is No Conflict Between the Decision of the Supreme Court of the State of Washington and the Decision of the Court of Appeals for any Circuit.

Rather than being in conflict with the decision of any United States Court of Appeals, the decision of which petitioner complains is in harmony with the decisions of both Courts of Appeals which have passed upon the question which petitioner seeks to bring before this court. Those two cases are:

McDonough v. Buckeye Steamship Company (N.D. Ohio 1951) 103 F.Supp. 473; (CA 6 1952) 200 F.(2d) 558; cert. den. 345 U.S. 926, 97 L.ed. 1357, 73 Sup.Ct. 785 (1953);

Robinson v. Northeastern Steamship Corporation (CA 2 1956) 228 F.(2d) 679; cert. den. 351 U.S. 937, 100 L.ed. 1465, 76 Sup.Ct. 834 (1956); pet. for rehearing den. 352 U.S. 860, 1 L.ed. (2d) 70, 77 Sup.Ct. 24 (1956).

In *McDonough v. Buckeye Steamship Company* the shipowner was held liable for the negligence of a seaman who had voluntarily undertaken to render assistance to an intoxicated shipmate. In that case, however, there was an established, recognized and invariable practice for assistance to be rendered to intoxicated crewmen at

the Great Lakes docks. In its opinion the trial court stated at 103 F.Supp. 475:

> "Olson (the Third Mate of the vessel) related that the customary and established practice — at the various Great Lakes docks — was for the dock guard to detain these men and either turn them over to a sober shipmate if one appeared or else call the ship. The officer in charge of the ship then would personally go ashore or would send someone else to assist the seaman. This procedure was known to defendant and was the accepted and recognized practice invariably followed."

The trial court then concluded at 103 F.Supp. 477:

> "Cox, in taking charge of Kerr, was acting in line with the well established and recognized practice known and acquiesced in by the defendant. Obviously therefore, that Cox was acting within the course and scope of his employment, so as to charge the defendant with liability, cannot be doubted."

This decision, imposing liability upon the shipowner, was affirmed in a *per curiam* opinion by the Court of Appeals for the 6th Circuit. Certiorari was thereafter denied by this court.

In *Robinson v. Northeastern Steamship Corporation* liability was not imposed upon the shipowner for the negligence of a crew member who had voluntarily undertaken to render assistance to an intoxicated shipmate. In that case, however, there was no established practice or custom. The Court of Appeals for the 2nd Circuit stated at 228 F.(2d) 681:

> "The case upon which the appellant relies, *Buckeye Steamship Company v. McDonough*, 6 Cir., 200 F.(2d) 558, cert. den. 345 U.S. 926, 73 S.Ct. 75, 97

L.ed. 1357, is readily distinguishable. There the shipowner was held liable for the death of a drunken seaman who was drowned when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

Certiorari was then denied by this court, and subsequently the petitioner's request for rehearing was likewise denied by this court.

The issuance of a writ of certiorari in this cause would not serve the useful purpose of enabling this court to resolve a conflict in decisions, for there is simply no conflict which calls for resolution.

II.

The Federal Question Upon Which Petitioner Seeks Review Was Never Reached in the Trial Court or, if Reached, Was Waived Upon Appeal to the Supreme Court of the State of Washington.

From the three questions set forth by petitioner as being the ones upon which he seeks review (Pet. cert. 3),

it can be deduced that the ultimate federal question upon which he seeks review is the following:

> "If, at a time when he is off-duty, a member of the crew of a vessel voluntarily undertakes to render assistance to an intoxicated shipmate, is the negligence, if any, of the one rendering assistance imputed as a matter of law to his employer, the shipowner?"

Petitioner contends (Pet. cert. 6) that the federal question was reached by the trial court's refusing to give petitioner's Requested Instruction No. 17 and by the court's giving its Instruction No. 11.

It is the position of respondent that the federal question was never reached in the trial court or, if reached in the trial court, was waived by petitioner upon appeal to the Supreme Court of the State of Washington.

1. The Federal Question was not Reached by the Trial Court's Refusing to Give Respondent's Requested Instruction No. 17.

In his petition, petitioner states (Pet. cert. 6):

> "It was petitioner's position throughout the trial, that when Palmer was found on the vessel in a helpless condition and unable to look out for his own safety, even though the helplessness was caused by intoxication; the vessel and the other crew members owed Palmer the duty to use reasonable care to assist Palmer to his quarters or to a place of safety where he would not be harmed by reason of his inability to protect himself. This obligation was due Palmer because he was a seaman and engaged in maritime employment. Under this theory, when Wood and Koski attempted to assist Palmer to his quarters, they were acting in the course of their employment for the vessel, and not as volunteers."

The record reveals, however, that throughout the trial petitioner took the position that the negligence, if any, of respondent's employees, Wood and Koski, was to be imputed to respondent not as a matter of law but by reason of the fact that Wood and Koski were allegedly acting pursuant to a recognized custom or practice of the vessel. That this was in fact petitioner's position at time of trial is shown by the following:

1. In his Second Amended Complaint (Tr. 1-4), the pleading upon which the case was tried, petitioner alleged in paragraph III thereof:

> "That plaintiff's superior officer observed the plaintiff and one of his fellow crew members observed the plaintiff in such condition and *in accordance with the usual and customary practice,* proceeded to assist plaintiff to safely return to his quarters." (Italics ours.)

2. The only legal memorandum submitted by petitioner to the trial court was his Memorandum on Plaintiff's Motion for Summary Judgment (Supp. R. 1). In that memorandum petitioner stated at page 2:

> "It also appears from these depositions that there is no dispute that a duty to help a sick and helpless seaman has been established *as the custom of the vessel* and such duty which is imposed upon all crew members." (Italics ours.)

On page 3 of that memorandum petitioner stated:

> "*A case directly in point on all of the facts and which applies the law is Buckeye Steamship Co. v. McDonough,* (D.C. Ohio) 1951 A.M.C. 2042, 103 F.Supp. 473, aff'd (C.C.A. 6th) 1935 A.M.C. 343
>
> . . . .
>
> "The case was tried in the lower court without

a jury (103 F.Supp. 473, 1951 A.M.C. 2042). That court held that leaving the decedent unattended in a place of danger and the failure to call for immediate help constituted actionable negligence for which the shipowner was liable. The court further held that a seaman who was assisting the decedent was in the course of his employment and acting in furtherance of his employer's interest in view of the practice of the dock guard to stop drunken seamen at the gate and not to allow them to proceed unaccompanied. *There was testimony in that case, as in the case at bar, that such was the established practice.*

"The lower court's opinion discussed the precarious position in which the decedent was permitted to remain and commented *upon the customary and established* practice to assist a seaman to a place of safety when they return to the vessel in an intoxicated condition." (Italics ours.)

On Page 8 of that memorandum petitioner stated with respect to *Robinson v. Northeastern Steamship Corporation* (CA 2 1956) 228 F.(2d) 679, cert. den. 351 U.S. 937, 100 L.ed. 1465, 76 Sup. Ct. 834, (1956) as follows:

"The court distinguished the facts in this case from that of *Buckeye S.S. Co. v. McDonough* (*supra*) where the assistance there rendered by the negligent sailor was *in accord with a long-standing custom which had been recognized and approved by the shipowner and consequently the negligent sailor was considered within the scope of his employment.* Reference is made to the testimony in the *McDonough* case which established this recognized custom and practice. *The similarity of such testimony to that of the case at bar is obvious.*" (Italics ours.)

3. By his Requested Instruction No. 10 (Supp. R. 22).

petitioner specifically requested the trial court to instruct the jury that respondent's liability for the acts of Wood and Koski depended upon whether those two men were acting in accordance with an established and recognized practice or custom on board the JOHN B. WATERMAN. This instruction was as follows:

> "If you find from the evidence that there was an *established and recognized practice or custom on board the* SS JOHN B. WATERMAN for its crew members and officers to assist any other crew member who is in a disabled condition by reason of intoxication or any other cause and thereby incapable of looking out for his own safety, and to assist said crew members to his quarters or other place of safety, and if you further find from the evidence that Engineer Wood and Frank Koski were assisting the plaintiff John C. Palmer *in accordance with such practice or custom,* then I instruct you that Engineer Wood and Frank Koski in assisting John C. Palmer were acting in the course and scope of their employment for the defendant, Waterman Steamship Corporation, at that time." (Italics ours.)

At no time during the trial of this cause did petitioner withdraw his Requested Instruction No. 10.

4. Throughout the course of the trial, counsel for petitioner asked questions of every seafaring witness with respect to the custom or practice on board the JOHN B. WATERMAN of crew members rendering assistance to intoxicated shipmates. If, as petitioner now contends, negligence was to be imputed to respondent as a matter of law, all of those questions were completely irrelevant and could only have misled the trial court as to petitioner's theory of liability.

5. Petitioner at no time requested the trial court to charge the jury that respondent was liable as a matter of law for the negligence, if any, of its employees, Wood and Koski. Such request would have been in these or similar words:

> "I instruct you as a matter of law that a member of a ship's crew is acting within the scope of his employment when he undertakes to render assistance to an intoxicated shipmate. If you find therefore that Donald Wood and Frank Koski undertook to render assistance to plaintiff at a time when plaintiff was intoxicated, then defendant Waterman Steamship Corporation is liable for any negligence of Donald Wood and Frank Koski in rendering that assistance to plaintiff."

Petitioner's Requested Instruction No. 17 was no such request, for had the trial court given that instruction, it still would have had to instruct the jury with respect to the imputation of negligence to respondent.

Moreover, the trial court did in fact charge the jury upon the very issues suggested by petitioner's Requested Instruction No. 17. The first sentence of the requested instruction was as follows:

> "I instruct you that under the law *and facts* in this case there is a duty on the part of the officers and crew of the SS JOHN B. WATERMAN to exercise reasonable care to escort and assist a fellow crew member of that vessel when on board and in a helpless condition by reason of intoxication." (Italics ours.)

This sentence simply reiterates the contention made in petitioner's pre-trial motion for summary judgment to the effect that a duty to assist petitioner had been

established by an allegedly uncontroverted proof of custom and practice on board the JOHN B. WATERMAN. (As pointed out by the Supreme Court of the State of Washington, however, the testimony upon this point was conflicting so that the issue was properly submitted to the jury.)

This sentence of the instruction also speaks upon the standard of care to which the actors are held, *i.e.*, to exercise reasonable care. That standard of care was, however, covered by the trial court in its Instruction No. 7 which charged the jury as follows:

> "Negligence is the failure to exercise reasonable and ordinary care, and by the term 'reasonable and ordinary care' is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions." (Appendix B)

The second sentence of the requested instruction was as follows:

> "I further instruct you in determining whether or not a seaman was in such condition as to require the assistance to which I have heretofore referred, you shall consider his condition with relation to the circumstances existing around said seaman and the place where he was found, at the time he was observed by the officers or men in such condition."

This aspect of the requested instruction was fully covered by the trial court in its Instructions Nos. 12A and 14. Instruction No. 12A was as follows:

> "I instruct you that the conduct of Frank Koski and Donald Wood with respect to plaintiff is to be judged, not by the actual state of sobriety or intoxication of plaintiff at the time Frank Koski

and Donald Wood were accompanying him, but rather by his state of sobriety or intoxication as then would have appeared to reasonably prudent men in the situation and circumstances of Frank Koski and Donald Wood." (Appendix C)

Instruction No. 14 was as follows:

"I instruct you that the term 'helpless,' used in these instructions, refers, in the normal meaning of the word, to the inability of a member of the crew to care for his own safety on board of the vessel in view of the conditions existing on board said vessel at that time." (Appendix D)

Having given its Instructions Nos. 7, 12A, and 14, the trial court would have had every reason to believe that it had fully covered the issues upon which petitioner had requested instruction by its Requested Instruction No. 17. The trial court had no way of divining that petitioner was requesting the court, as he now contends, to instruct the jury that the negligence, if any, of respondent's employees was to be imputed as a matter of law to respondent. It was not put on notice by petitioner's Requested Instruction No. 17 that petitioner had adopted an entirely new and different theory of imputed liability:

2. The Federal Question, if Reached by the Trial Court's Giving Instruction No. 11, Was Waived Upon Appeal to the Supreme Court of the State of Washington.

At the time of trial the court instructed the jury by its Instruction No. 11 that respondent was not liable for the acts of its employees, Wood and Koski, in rendering assistance to Palmer, unless the jury found that there was a custom or practice, known to respondent, for mem-

bers of the crew of the JOHN B. WATERMAN to assist other members of the crew who were intoxicated.

The court was fully justified in giving that instruction because petitioner had himself requested its equivalent by his Requested Instruction No. 10 (Supp. R. 22). The court's instruction was based squarely upon the holdings in *McDonough v. Buckeye Steamship Company* (N.D. Ohio 1951) 103 F.Supp. 473; (CA6 1952) 200 F.(2d) 588; cert. den. 345 U.S. 926, 97 L.ed. 1357, 73 Sup.Ct. 785 (1953) and *Robinson v. Northeastern Steamship Corporation* (CA2 1956) 228 F.(2d) 679; cert. den. 351 U.S. 937, 100 L.ed. 1465, 76 Sup.Ct. 834 (1956); pet. for rehearing den. 352 U.S. 860, 1 L.ed. (2d) 70, 77 Sup.Ct. 24 (1956).

It is self-evident that if the trial court was in error in giving its Instruction No. 11, that error was plainly invited by petitioner when he submitted his Requested Instruction No. 10.

Moreover, upon his appeal to the Supreme Court of the State of Washington petitioner stated his sole ground for appeal from the giving of Instruction No. 11 in the following words (Supp. R. 30; App. Brief 52):

> "The court committed error in the giving of Instruction No. 11 which charged the jury:
>
> [here the instruction was set out]
>
> such definition of practice or custom is incorrect because it requires the jury to find that the custom was followed without variance and not generally and that the custom or practice must be followed every time before such duty could be established."

This assignment of error was in compliance with Rule

43 of the Rules on Appeal promulgated by the Supreme Court of the State of Washington which provides as follows:

> "No alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the 'assignments of error' in appellant's brief . . . "

The Supreme Court of the State of Washington disposed of that assignment of error by correctly pointing out that the appellant made no such objection to the instruction at the time of trial and that he could not make such objection for the first time upon appeal (Pet. cert. 18).

Appellant chose to appeal to the Supreme Court of the State of Washington solely upon the ground that the word "invariable" should not have been included in the instruction. Having so chosen, he thereby abandoned any other possible errors in that instruction.

Ennis v. Ring, 49 Wn.(2d) 284, 300 P.(2d) 773 (1956);

Erdmann v. Henderson, 50 Wn. 2d) 296, 311 P.(2d) 423 (1957).

He cannot now be heard to say that the giving of that instruction reached the federal question upon which he now seeks review inasmuch as he did not bring that question before the Supreme Court of the State of Washington for decision.

III.

This Case Was Disposed of by the Supreme Court of the State of Washington Upon a Non-Federal Ground Which Was Sufficient in and of Itself to Sustain the Judgment.

No principle has been more firmly established by this court than that it will not review the judgment of a state court if that judgment rests upon a non-federal ground sufficient in and of itself to sustain the judgment.

In *Fox Film Corporation v. Muller*, 296 U.S. 207, 80L.ed. 158 (1935) this court stated at 296 U.S. 210, 80 L.ed. 159:

> " . . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.ed. 635, 637, and has been reiterated in a long line of cases since that time."

In the case of *Lynch v. People of the State of New York*, 293 U.S. 52, 79 L.ed. 191 (1934) this court stated at 293 U.S. 54, 79 L.ed. 193:

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented to the highest court of the state having jurisdiction but that its decision of a federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Cases cited.)

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

By petitioning for a writ of certiorari, petitioner seeks an opportunity to try to persuade this court to hold that a shipowner is liable as a matter of law for the negligence, if any, of a crew member who voluntarily undertakes to render assistance to an intoxicated shipmate.

By affirming the trial court's Instruction No. 11, however, the Supreme Court of the State of Washington has already held that the imputation of negligence to the shipowner is dependent upon the existence of a recognized custom or practice of rendering such assistance. That holding was based entirely upon a state ground.

At the time of trial petitioner took exception to the giving of Instruction No. 11 in these words (R. 33):

> "Plaintiff excepts to the court's giving of Instruction No. 11, where the court makes it as an issue whether or not a custom or practice to care for helpless seaman exists, which instruction reads as follows:
>
> [here the instruction was set out]
>
> on the ground and for the reason stated in my motion to direct the jury to find such custom and practice as a matter of law and does not apply to maritime law."

(It is to be particularly noted that in this exception, taken on the final day of trial, petitioner was still speaking in terms of "custom and practice.")

As pointed out in the preceding section of this brief, petitioner's only assignment of error to the Supreme Court of the State of Washington with respect to the trial court's giving Instruction No. 11 was in these words:

> "The court committed error in the giving of Instruction No. 11 which charged the jury:
>
> [here the instruction was set out]
>
> such definition or practice or custom is incorrect because it requires the jury to find that the custom was followed without variance and not generally and that the custom or practice must be followed every time before such duty could be established."

The Supreme Court of the State of Washington sustained the giving of that instruction in these words (Pet. cert. 18):

> "Appellant assigns as error the submission to the jury of the issue of whether or not there was an 'invariable' custom under which the shipowner owed a duty of care to an intoxicated seaman. The testimony of this point was conflicting and appellant now objects to the word 'invariable' in the instruction. No such objection was made at the time the instruction was submitted to the jury. It cannot be raised later for the first time."

The Supreme Court of the State of Washington was compelled to so hold by its many prior holdings that an appellant will not be heard to appeal from the giving of an instruction upon a ground which he did not call to the attention of the trial court.

Peterson v. King County, 45 Wn.(2d) 860, 278 P.(2d) 774 (1954);

Sigurdson v. City of Seattle, 48 Wn.(2d) 155, 292 P.(2d) 214 (1956).

By sustaining the trial court in the giving of Instruction No. 11, the Supreme Court of the State of Washington has ruled upon a non-federal ground (the failure by petitioner to comply with applicable state appellate procedure) that Instruction No. 11 was invulnerable upon appeal. It has thereby held that the trial court properly charged the jury that respondent was not liable for the acts of Donald Wood and Frank Koski unless those men were acting pursuant to a recognized practice or custom of assisting intoxicated crewmen.

This holding makes futile the issuance of a writ of certiorari in this cause inasmuch as the Supreme Court of the State of Washington has thereby completely disposed of the question upon which petitioner seeks review upon a non-federal ground sufficient in and of itself to sustain the judgment.

Should this court issue a writ of certiorari in order to review the refusal by the trial court to give petitioner's Requested Instruction No. 17, it would find that it could not hold that the trial court had erred in refusing to give that instruction without at the same time holding that the Supreme Court of the State of Washington was in error in holding (upon a non-federal ground), that there was no error in the giving of Instruction No. 11.

If this court should leave undisturbed the holding of

the Supreme Court of the State of Washington with respect to the trial court's Instruction No. 11 but should hold that the trial court was in error in its failure to give Requested Instruction No. 17, the trial court upon re-trial would be left in a position where it could not at one and the same time adhere to the decision of the Supreme Court of the State of Washington and to that of this court. This, because the trial court's Instruction No. 11, already sustained upon a non-federal ground, is in irreconcilable conflict with petitioner's Requested Instruction No. 17. The former tells the jury that liability can be imputed to respondent only if Donald Wood and Frank Koski were acting pursuant to a recognized practice and custom of rendering assistance to intoxicated shipmates. The latter (if petitioner's present interpretation of that request be accepted) tells the jury that respondent is liable as a matter of law for the acts of its employees irrespective of any practice or custom. Such contradictory instructions could not be given to a jury.

The trial court upon re-trial would be compelled by a long line of Washington decisions to give Instruction No. 11 again, for instructions which have been sustained upon appeal become thereby the "law of the case" and must be given upon re-trial.

Kennett v. Yates, 45 Wn.(2d) 35, 272 P.(2d) 122 (1954);

Columbia Steel Company v. State of Washington, 34 Wn.(2d) 700, 209 P.(2d) 482 (1949);

Miller v. Sisters of St. Francis, 5 Wn.(2d) 204, 105 P.(2d) 32 (1940).

It would be in consequence a futile thing for this court to review the trial court's failure to give petitioner's Requested Instruction No. 17 unless this court is prepared to set aside the holding by the Supreme Court of the State of Washington, upon an exclusively non-federal ground, that the trial court did not err in giving its Instruction No. 11.'

CONCLUSION

We therefore respectfully urge that a writ of certiorari not be issued in this cause to the Supreme Court of the State of Washington.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX A

PETITIONER'S REQUESTED INSTRUCTION NO. 10 (Supp. R. 22)

If you find from the evidence that there was an established and recognized practice or custom on board the SS "JOHN B. WATERMAN" for its crew members and officers to assist any other crew member who is in a disabled condition by reason of intoxication or any other cause and thereby incapable of properly looking out for his own safety, and to assist said crew member to his quarters or other place of safety, and if you further find from the evidence that Engineer Wood and Frank Koski were assisting the plaintiff JOHN C. PALMER in accordance with said custom or practice, then I instruct you that Engineer Wood and Frank Koski in assisting John C. Palmer were acting in the course and scope of their employment for the defendant, WATERMAN STEAMSHIP CORPORATION, at that time.

McDonough v. Buckeye Steamship Co., 103 F. Supp. 473, 1951 A.M.C. 2042, aff'd (CCA 6) 1953 A.M.C. 343.

APPENDIX B

TRIAL COURT'S INSTRUCTION NO. 7 (in part)
(Statement of Facts 441)

"Negligence" is the failure to exercise reasonable and ordinary care, and by the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions.

APPENDIX C

TRIAL COURT'S INSTRUCTION NO. 12A
(Statement of Facts 444)

I instruct you that the conduct of Frank Koski and Donald Wood with respect to plaintiff is to be judged, not by the actual state of sobriety or intoxication of plaintiff at the time Frank Koski and Donald Wood were accompanying him, but rather by his state of sobriety or intoxication as then would have appeared to reasonably prudent men in the situation and circumstances of Frank Koski and Donald Wood.

APPENDIX D

TRIAL COURT'S INSTRUCTION NO. 14
(Statement of Facts 445)

I instruct you that the term "helpless," used in these instructions, refers, in the normal meaning of the word, to the inability of a member of a crew to care for his own safety on board of the vessel in view of the conditions existing on board said vessel at that time.

APPENDIX E

RULE 43 OF THE RULES OF APPEAL OF THE SUPREME COURT OF THE STATE OF WASHINGTON (Rules of Court Revised Code of Washington Vol 0)

No alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the "assignments of error" in appellant's brief. In appeals from all actions at law or in equity tried to the court without a jury, the findings of fact made by the court will be accepted as the established facts in the case unless error is assigned thereto. No error assigned to any finding or findings of fact made or refused will be considered unless so much of the finding or findings as is claimed to be erroneous shall be set out verbatim in the brief. No error assigned to the inclusion, omission, sufficency, or insufficiency of an instruction or instructions, given or not given, will be considered unless such instruction or instructions, as the case may be, shall be set out in the brief in full. *Provided,* That the objection that the superior court had no jurisdiction of the cause or that the complaint does not state sufficient facts to constitute a cause of action, or that the supreme court has no jurisdiction of the appeal, may be taken at any time.

APPENDIX F

PETITIONER'S ASSIGNMENT OF ERROR NO. 3 TO THE SUPREME COURT OF THE STATE OF WASHINGTON

(Supp. R. 30: Brief of Appellant 52)

The court committed error in the giving of Instruction No. 11 which charged the jury:

> "I instruct you that defendant is not liable for the acts of Frank Koski and Donald Wood in rendering assistance to plaintiff unless you find that there was on board the 'JOHN B. WATERMAN' a practice or custom which was invariably followed and which was known to or should have been known in the exercise of reasonable care to the Master of the ship owned by the defendant and which was for the benefit of the shipowner."

such definition of practice or custom is incorrect because it requires the jury to find that the custom was followed without variance and not generally and that the custom or practice must be followed every time before such duty could be established.